



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Compuserve; Comnet Corporation
File: B-228286; B-228286.2
Date: January 20, 1988

DIGEST

1. Under agency procurement using the General Services Administration multiple award schedule contract teleprocessing services program, in the absence of specific authority to exclude vendor which does not have a MASC prior to issuance of agency statement of requirements, agency may consider offer of vendor which has submitted a timely response to MASC solicitation and completes MASC negotiation prior to agency deadline for submission of offers.
2. Agency's technical conclusion that vendor's configuration complies with solicitation's mandatory operational requirement is reasonable where record shows that proposed configuration was tested thoroughly before award and configuration met mandatory requirement.

DECISION

Compuserve and the Comnet Corporation (Comnet) protest the issuance of a delivery order to Martin Marietta Data Systems (Marietta) under a General Services Administration (GSA) multiple award schedule contract (MASC) for teleprocessing services (TSP). Under the TSP MASC program, GSA enters into contracts with qualified vendors. Each vendors description of services and detailed price matrix is set out in the MASC, and forms a basis for agency decisions as to which vendor's system will result in the lowest cost to the government. GSA has promulgated regulations and issued implementing procedures governing the selection by using agencies of the appropriate vendor's MASC. See Federal Information Resources Management Regulation, 41 C.F.R. § 201-32.303 (1985); GSA Teleprocessing Services Program Handbook (Oct. 1981).

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Both Compuserve and Comnet argue that Marietta should not have been permitted to participate in the instant procurement because it did not have a valid MASC when the user agency, the Immigration and Naturalization Service (INS), issued its letter of interest notifying contractors of its plan to purchase automatic data processing services under the TSP MASC program. Compuserve also argues that Marietta's offer failed to meet INS mandatory requirements, alleges unfair treatment by INS in providing a list of responding vendors to some competitors but not others, and argues that GSA and INS improperly allowed Marietta to amend its MASC after established time deadlines.

We deny Comnet's protest. We deny Compuserve's protest in part and dismiss it in part.

INS initiated the instant procurement as part of an effort to discharge its duties under the Immigration Reform and Control Act of 1986 (IRCA). To assist state authorities in determining the eligibility of aliens to receive certain federally subsidized benefits, IRCA directed INS to make available data contained in INS records. INS decided that a nationally available teleprocessing network would provide state authorities with the most efficient method of accessing INS data.

The record indicates that INS had the choice of using GSA's multiple award schedule or a "Basic Agreement" to procure TSP and decided to utilize the GSA schedule in view of a statutory deadline of October 1, 1987, to provide the necessary services. On April 22, INS provided the 34 GSA schedule contractors with the letter of interest and vendor information package (solicitation) defining the agency's needs. The letter asked vendors to respond to INS by May 22, 1987, with any modifications and price reductions to its current MASC. It required that all modifications be operational by the start of benchmarking and further advised that benchmark materials must be requested within 7 days of the date of the letter of interest. The vendor package set out the agency's requirements and the evaluation and selection criteria including mandatory requirements. The procedures called for a review of the offerors written response to the technical questionnaire, a benchmark evaluation and a cost evaluation. The document also advised that award was to be made to the vendor meeting all mandatory requirements who received the highest total points on a scale of 95 points for cost (awarding 95 points for lowest

discounted system life cost) and 5 points for offering an optional feature.^{1/}

Six vendors without a current MASC, including Marietta, asked for a copy of the letter of interest. Marietta had a MASC for fiscal years (FY) prior to 1987 and had submitted a proposal for a FY 1987 MASC in response to GSA's solicitation. However, pending resolution of certain audit issues, GSA had declined to extend the Marietta FY 1986 contract past March 30, 1987. Nevertheless, Marietta along with the other interested vendors requested benchmark materials. After inviting and responding to questions concerning the procurement documents, INS released benchmark materials to 14 vendors including Marietta on June 17, 1987. On June 23, INS issued amendment No. 1 which relaxed the selection schedule to provide 30 days from the release of the benchmark materials on June 17 (i.e., until July 17) for vendors to prepare and submit to GSA amendments to their MASC's needed to meet INS specific requirements or to offer price reductions. Under the original schedule, vendors had been left with only 4 days for amendment submission. On July 7, nine vendors asked to be scheduled for benchmarks and a schedule was prepared. On July 15, INS issued amendment No. 2 which further relaxed the date for submission of MASC amendments to July 22. Both amendments extending the date for submission of the MASC amendments came in response to vendors' requests for more time. Amendment No. 2 also provided a revised selection schedule that showed that the benchmark testing would be completed prior to submission of completed technical questionnaires. On July 20, 2 days prior to INS's deadline for vendors to submit MASC amendments, GSA awarded Marietta a 1987 MASC. Marietta then submitted a timely request to GSA for modification of its MASC.

On August 3, INS began releasing benchmark tapes to the participating vendors. Benchmark observations began on August 10. On August 21, vendors responded to INS' technical questionnaire; on September 10, vendors submitted best and final offers and final net discounts. INS completed its review of offers, on September 11 and issued a delivery order to Marietta on September 22, 1987.

On September 24, Compuserve, the fourth lowest offeror, filed a protest with this Office. On October 2, Comnet, the second low offeror, filed its protest with this Office.

^{1/} The optional feature was a "point of sale" capability, which did not affect the relative standing of the parties involved here.

The protesters initially argue that Marietta should not have been permitted to participate in the procurement because it did not have a valid schedule contract with GSA when INS issued its letter of interest. However, the protesters have not cited any specific authority--statute, regulation or solicitation provision--which precluded the participation of Marietta because it did not have an approved FY 1987 MASC before issuance of INS's letter of interest. We further note that GSA which administers and awards the MASCs did not at any time object to Marietta's participation in this procurement.^{2/} Further the cover sheet to the list of MASC vendors provided to INS by GSA states that additional FY 1987 contracts may be awarded at anytime. While it also advised user agencies to verify that they have the most recent list of vendors, we do not read this as implying, as Compuserve asserts, that only those vendors with MASC's at time of issuance of the letter of interest may participate in the procurement. In view of the mandate of the Competition in Contracting Act of 1984 (CICA) for "full and open competition," and the failure of the protesters to identify any legal basis to exclude Marietta, we conclude that INS properly considered Marietta's offer. See CICA, 41 U.S.C. § 253(a)(1)(A) (Supp. III 1985).

Compuserve also asserts that Marietta's offer and the second and third low offers were nonconforming to INS requirements. Compuserve specifically points out that the vendor information package listed a mandatory requirement for "computerized voice response" and requires that vendors provide capability for system access by touch-tone, using voice prompting and/or menus after a connection has been established. In response to agency arguments that as fourth low offeror, Compuserve is not an interested party to raise this issue under our Bid Protest Regulations, Compuserve informs our Office that none of the MASC's examined by Compuserve offers voice response, which is a mandatory requirement. Consequently, Compuserve believes that it may be the only vendor responsive to INS' mandatory requirements.

^{2/} We have long recognized that the Brooks Act, 40 U.S.C. § 759 (1982), vests in GSA broad authority over government procurement of ADP equipment; consequently, GSA has discretion to develop and implement any policy regarding the award of schedule contracts that is not contrary to law or otherwise detrimental to the government's interests. Federal Sales Service, Inc., B-222798.2, July 1, 1986, 86-2 CPD ¶ 4.

The agency response expresses INS's belief that Marietta provided a sufficient description of their computerized voice output capability; furthermore, GSA takes the position that INS may look beyond the face of the MASC and allow Marietta to demonstrate its voice capability through benchmarking and other evaluation procedures.

Compuserve, on the other hand, argues that it was improper to let vendors benchmark if they had not previously demonstrated compliance with mandatory requirements. First, Compuserve asserts that the vendor package provided that benchmarking would occur only after evaluation of technical questionnaires and allowed elimination of vendors who failed to satisfy mandatory requirements. Furthermore, GSA's TSP handbook provides that procuring agencies make a technical evaluation prior to benchmarking and that vendors not be benchmarked if not found technically acceptable. We find Compuserve's contentions without merit.

The INS solicitation clearly states that failure to satisfy mandatory requirements "may" result in elimination from competition. Our Office has recognized that benchmarking may be used to evaluate an offeror's technical capability. Exide Power Systems Division, ESB Inc., 57 Comp. Gen. 653 (1978), 78-2 CPD ¶ 106.

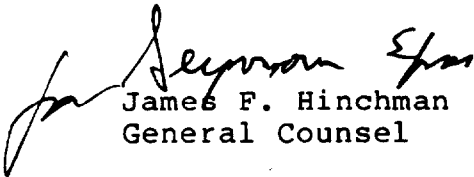
Although the TSP handbook reflects Federal Information Resources Management Regulation (FIRMR) requirements, the FIRMR itself provides that the TSP handbook is not a regulation and therefore the handbook provides no independent basis for excluding legitimate offerors from a competition. 41 C.F.R. § 201-32.303(d)(2). Furthermore, INS's decision to benchmark prior to making the technical evaluation was apparent from amendment No. 2, issued July 15, which indicated benchmarking would occur prior to submission of the technical questionnaire responses. To the extent that Compuserve's objects to this procedure, its protest is untimely under our Bid Protest Regulations since it was filed substantially after (postaward) the next closing date subsequent to the incorporation of this amendment. 4 C.F.R. § 21.2(a)(1) (1987). We believe that by the terms of the solicitation, INS had discretion to perform benchmarking prior to evaluating technical responses, and that vendors were on notice that the original schedule had been modified to allow this. We have no reason to believe that INS abused its discretion.

Procuring agencies have the primary responsibility for evaluating data supplied by an offeror and ascertaining whether it provides sufficient information to determine the acceptability of an offeror's product, and we will not disturb the agency's technical determination unless the

protester shows that determination to be unreasonable. Peck Equipment Co., B-227135, July 13, 1987, 87-2 CPD ¶ 40. We find that INS properly considered the results of benchmark testing in deciding whether vendors met its mandatory requirements. Cheshire/Xerox; Miller/Bevco; Automecha, Ltd., B-226939 et al., Aug. 31, 1987, 87-1 CPD ¶ 208. The record indicates that Marietta demonstrated the mandatory voice response requirement and that Marietta responded to this requirement in its technical proposal. Since the record shows that Marietta met the voice response requirement, we deny this aspect of its protest.

Given that Marietta is technically acceptable and INS's award to Marietta was proper, Compuserve is not in line for award. A protester not in line for award generally lacks standing under our Bid Protest Regulations to have its protest considered on the merits. Storz Instrument Co., B-228534, Oct. 29, 1987, 87-2 CPD ¶ 414. Under these circumstances, Compuserve's allegation that GSA's and INS's acceptance of Marietta's modification to its MASC was improper is dismissed. Compuserve also alleges that an unnamed offeror was provided information about the identities of the offerors permitted to benchmark. To the extent this is directed at Marietta, Compuserve is not an interested party. In any event, the record does not support this allegation and we deny this protest issue.

We deny Compuserve's protest and dismiss it in part. We deny Comnet's protest and conclude that Comnet is not entitled to recover its proposal preparation or protest costs. Fischer Marine Repair Corp., B-228297, Nov. 20, 1987, 87-2 CPD ¶ 497.


James F. Hinchman
General Counsel